

UNITED STATES OF AMERICA )  
Complainant, )  
 )  
v. )  
 ) 8 U.S.C. § 1324a Proceeding  
JAIME CANALES III, INDIVIDUALLY ) Case No. 95A00029  
AND D/B/A SUPER SPORT MOTORS, )  
Respondent. )

FINAL DECISION AND ORDER GRANTING MOTION  
FOR DEFAULT JUDGMENT  
(July 13, 1995)

MARVIN H. MORSE, Administrative Law Judge

Appearances: Lee Abbott, Esq., for Complainant.  
Jaime Canales, III, pro se.

## I. PROCEDURAL HISTORY

On February 21, 1995, the Immigration and Naturalization Service (INS or Complainant) filed its Complaint, dated February 15, 1995, in the Office of the Chief Administrative Hearing Officer (OCAHO). The Complaint includes an underlying Notice of Intent to Fine (NIF) served by INS upon Francisco Alfonso Gutierrez<sup>1</sup> on July 21, 1994.

Count I of the Complaint charges Respondent with knowingly hiring and/or continuing to employ one named individual. The civil money penalty assessed for Count I is \$1,450. Count II of the Complaint charges Respondent with failure to prepare, retain, and/or make available for inspection the employment eligibility verification form (Form I-9) for four named individuals. The civil money penalty assessed for Count II is \$2,450. INS demands a total of \$3,900 in civil money penalties. In addition, INS requests that I direct Respondent to cease and desist from further violations. Exhibit B to the Complaint is Respondent's August 2, 1994 request for hearing. The request was made by Bertha A. Zuniga, Esq., who subsequently withdrew from the case on January 9, 1995.

On February 24, 1995, this Office issued its Notice of Hearing (NOH) which transmitted the Complaint to Respondent. The NOH cautioned Respondent that failure to file an Answer with the administrative law judge (ALJ) within thirty (30) days of receipt

1 The return receipt evidencing service of process upon  
Respondent was endorsed by Francisco Alfonso Gutierrez at  
Respondent's address in El Paso, Texas.

might result in a waiver of the right to appear and contest Complainant's allegations. Respondent was warned explicitly that absent a timely answer, the judge might "enter a judgment by default along with any and all appropriate relief."

On April 4, 1994, the Case Management Staff of this Office notified the ALJ that the NOH was returned by the Postal Service marked "Unclaimed." The NOH was forwarded to counsel for Complainant to effect service. On April 13, 1995, INS Special Agent Armando Marquez delivered the NOH and Complaint to Respondent by leaving a copy of the NOH with Jorge Basurto-Cordova, the person in charge of the enterprise at Super Sport Motors, 6825 Alameda Ave., El Paso, TX 79905. To date, no answer to the Complaint has been filed.

On June 16, 1995, counsel for Complainant filed a Motion for Default Judgment. The Motion was served on Respondent, Jaime Canales III, on June 12, 1995. In its Motion, Complainant asserts that Respondent is in default because he failed to plead or otherwise defend within 30 days of the receipt of said Complaint as required by 28 C.F.R. §68.9(b).<sup>2</sup>

On June 22, 1995 I issued an Order to Show Cause Why Default Judgment Should Not Issue (OSC). The OSC stated that:

This Order provides Respondent an opportunity to explain his failure to have timely answered the Complaint and invites Respondent to show cause, if any he has, why judgment should not be issued against him in the amount and for the reasons specified in the Complaint.

A response to this Order will be considered timely, if received by me no later than July 7, 1995. By such filing, Respondent is obliged to show such cause as he has as to why he failed to timely file an answer to the Complaint, and why a default judgment should not issue. Any filing must include a true certificate that a copy has been sent, postage prepaid to INS. The filing must be accompanied by a proposed Answer to the Complaint.

Respondent's copy of the OSC was returned to this Office by the United States Postal Service bearing the legend "Return to Sender No Forward Order on File Unable to Forward Return to Sender."

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<sup>2</sup> Rules of Practice and Procedure for Administrative Hearings, 28 C.F.R. pt. 68 (1994), as amended by 59 Fed. Reg. 41,243 (1994) (to be codified at 28 C.F.R. § 68.2(i), (k)) [hereinafter cited as 28 C.F.R. pt. 68].

## II. DISCUSSION

The Rules of Practice and Procedure of this Office contemplate that:

A party shall be deemed to have abandoned a complaint or a request for hearing if

(1) A party or his or her representative fails to respond to orders issued by the Administrative Law Judge.

28 C.F.R. § 68.37(b)(1).

In addition, OCAHO caselaw demonstrates that failure to respond to an order to show cause triggers a judgment of default, equivalent to dismissal of the employer's request for hearing, against an employer who fails to respond to the invitation of such an order:

Having made no filing in response, Respondent necessarily positioned itself for entry against it of a judgment by default. This is that judgment.

U.S. v. Hosung Cleaning Corp., 4 OCAHO 681 (1994). In a number of other OCAHO cases, even though they appeared pro se, without counsel, parties that failed to obey orders of the judge were found to have abandoned their requests for hearing, U.S. v. Erlina Fashions, Inc., 4 OCAHO 656 (1994) or to have abandoned their complaints. See e.g., Holquin v. Dona Ana Fashions, 4 OCAHO 605 (1994); Brooks v. Watts Window World, 3 OCAHO 570 (1993); Castillo v. Hotel Casa Marina (Marriott), 3 OCAHO 508 (1993); Speakman v. The Rehabilitation Hospital of South Texas, 3 OCAHO 476 (1993); Palancz v. Cedars Medical Center, 3 OCAHO 443 (1992).

Respondent is in default not only for failure to answer the Complaint but also for failure to respond in time, or at all, to the OSC. I find and conclude that the effort of this Office to reach Respondent by mailing the OSC should not be frustrated by his failure to provide the Postal Service with a forwarding address. Accordingly, having failed to answer the Complaint or respond to the OSC, I find Respondent in default. See 28 C.F.R. §§ 68.9(b), 68.37(b)(1).

## III. ULTIMATE FINDINGS, CONCLUSIONS AND ORDER

I have considered the Complaint filed by the INS and the Motion for Default Judgment. All motions and other requests not specifically ruled upon are denied.

For the reasons already stated, I find and conclude that:

1. Complainant's Motion for Default Judgment is granted;

2. As alleged in the Complaint, Respondent is in violation of 8 U.S.C. § 1324a(a)(1)(B) with respect to each employee named in the Complaint, as to whom Respondent is found to have:

- a. Count I: knowingly hired and/or continued to employ one named employee at an assessment of \$1,450, for a civil money penalty of \$1,450;
- b. Count II: failed to prepare, retain, and/or make available for inspection the Form I-9 for four named individuals at an assessment of \$550 for individuals numbered A-1, A-2, and A-3, and \$800 for individual numbered A-4, for a civil money penalty of \$2,450;

3. Respondent shall pay a civil money penalty in the amount of three thousand, nine hundred dollars (\$3,900) for violations listed in the Complaint.

4. Respondent shall cease and desist from violating 8 U.S.C. § 1324a;

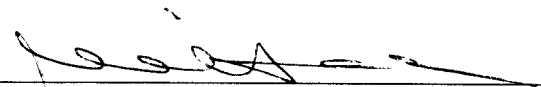
5. The hearing is cancelled.

Pursuant to 8 U.S.C. § 1324a(e)(7), this Final Decision and Order is the final administrative adjudication in this proceeding and shall become final "unless within 30 days, the Attorney General modifies or vacates the decision and order, in which case the decision and order of the Attorney General shall become a final decision and order. . . ."

"A person or entity adversely affected by a final order respecting an assessment may, within 45 days after the date the final order is issued, file a petition in the Court of Appeals for the appropriate circuit for review of the order." 8 U.S.C. § 1324a(e)(8).

SO ORDERED.

Dated and entered this 13th day of July, 1995.

  
Marvin H. Morse  
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of the attached Final Decision and Order Granting Motion for Default Judgment were mailed first class, postage prepaid, and certified mail, return receipt requested as indicated, this 13th day of July, 1995, addressed as follows:

Counsel for Complainant

Lee Abbott, Esq.  
Immigration and Naturalization Service  
1545 Hawkins Blvd.  
El Paso, TX 79925

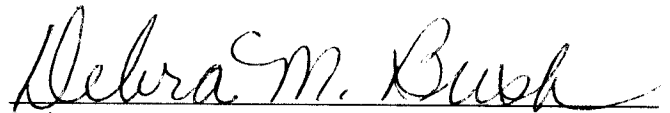
Cristina Hamilton, Esq.  
Immigration and Naturalization Service  
425 "I" Street, NW, Room 6100  
Washington, DC 20536

Respondent

Jaime Canales, III (Certified Mail)  
6825 Alameda Ave.  
El Paso, TX 79905

Office of the Chief Administrative Hearing Officer

5107 Leesburg Pike, Suite 2519  
Falls Church, VA 22041



Debra M. Bush  
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